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Comptroller General of the United States

Washington, D.C. 20548

# Decision

Matter of: MRK Incineration/IDM Corp., a Joint Venture;

Halliburton NUS Environmental Corp.

File:

B-244406.5; B-244406.6

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### DIGEST

- 1. Agency properly excluded proposal from competitive range where the initial proposal failed to meet the solicitation requirements in 72 out of 83 evaluation areas and, following discussions and submissions of revised proposals, the proposal still failed to comply with the solicitation requirements in 30 evaluation areas.
- 2. Protester's new and independent grounds of protest first filed with the General Accounting Office (GAO) after denial of protest filed with the agency are dismissed as untimely where later raised issues do not independently satisfy GAT's timeliness rules.
- 3. Allegation that agency devoted insufficient time to evaluate revised proposals is denied where revisions were not extensive, agency used the same evaluators to review the revised proposals, and protester has not specifically challenged any aspect of the reviewers' evaluation.

# DECISION

MRK Incineration/IDM Corp., a Joint Venture (MRK) and Halliburton NUS Environmental Corp. protest the elimination of their proposals from the competitive range under request

for proposals (RFP) No. DACW41-90-R-0037, issued by the Department of the Army, Corps of Engineers, for construction of the Bayou Bonfouca Source Control Operable Unit at Bayou Bonfouca, St. Tammany Parish, Louisiana. MRK alleges that the procurement process was flawed and that the agency did not properly consider the potential cost savings in its competitive range determination. Halliburton argues that the agency evaluated proposals in accordance with undisclosed criteria and failed to provide offerors with meaningful discussions.

We dismiss the protests in part and deny them in part.

## BACKGROUND

The solicitation contemplated a firm, fixed-price contract for performance of various renediation tasks including; excavation and incineration of contaminated bayou sediments; placement of a Resource Conservation Recovery Act (RCRA) cap over the incinerator ash; placement of a layer of clean material within the bayou following excavation; and operation of an existing groundwater extraction and treatment system for a 2-year period.

Offerors were required to submit separate price and technical proposals. The solicitation provided that technical proposals would be evaluated on the basis of 21 criteria, which were listed in the RFP in descending order of importance. For evaluation purposes, these factors were further subdivided into 83 evaluation areas with various weights assigned to each area reflecting the overall order of importance established in the solicitation.

The RFP provided that award would be made to the offeror whose proposal offered the best overall value to the government, stating:

"This will be determined by comparing differences in the value of the above technical factors with differences in the cost to the Government. In making this comparison the Government is concerned with striking the most advantageous balance between these factors and cost to the Government. The closer the final, evaluated factor scores of acceptable offers are to one another, the greater will be the importance of cost factors in making the award determination. The closer the final cost factors are to one another, the greater will be the importance of the technical scores in making the award determination." (Emphasis in original.)

Seven offerors submitted initial technical proposals on March 4, 1991, and price proposals were submitted on March 22. The technical quality evaluation panel (TQEP) evaluated the technical proposals by assigning a score of 0 to 4 in each of the evaluation areas. The number of evaluation areas in which the various proposals were deficient (that is, areas where they had received ratings of 0 or 1) ranged from 18 to 72. MRK was deficient in 72 areas with a score of 162.86 points out of 1,000, and Halliburton was deficient in 32 areas with a score of 377.77 points.

The price evaluation panel also reviewed the price proposals, determining that the proposals did not appear unbalanced and did not contain mathematical errors. The price proposals were ranked on the basis of stated price into three groups—low, middle, and high; both MRK and Halliburton were included in the low group.

On April 8, the source selection authority (SSA) established an initial competitive range consisting of all seven offerors. By letters dated April 12, the agency initiated discussions with each offeror, advising them of the specific areas in which their proposals were technically deficient. The offerors responded by submitting revised technical proposals on April 24, which the TQEP again evaluated. As a result of this evaluation, the TQEP determined that MRK's proposal was still deficient in 30 areas with a score of 362.90 points, and Halliburton's proposal was still deficient in 8 areas with a score of 468.49 points.

The separate price proposal due date was established because of a delay in receiving the applicable waste disposal wage rates from the Department of Labor.

<sup>&#</sup>x27;The agency's source selection plan provided that a score of 0 meant the proposal was clearly deficient and could not be corrected without substantial changes or complex negotiation; a score of 1 meant the proposal was deficient, but could be corrected through simple negotiation; a score of 2 meant the proposal minimally met the solicitation requirements, and scores of 3 and 4 meant the proposal met the solicitation requirements and offered "considerable" advantage or "great" advantage to the government in the areas of evaluation.

After reviewing the initial proposals, the agency discovered a deficiency in the "Conceptual Project Delivery Schedule" and issued an amendment to correct it. Consequently, the SSA determined that all offerors should have the opportunity to submit revised proposals.

On May 9, the source selection board (SSB) met and was given narrative evaluation summaries for each proposal along with matrices which summarized the technical ratings for each proposal by evaluation factor, line item, and total score. The SSB was also advised as to which group ("low," middle," or "high") each price proposal was in and the average price for each group.

Based on the information provided, the SSB concluded that three proposals should be eliminated from the competitive range, including those submitted by MRK and Halliburton. This determination was based on the SSB's conclusion that these proposals contained significant technical deficiencies and that major revisions to these proposals would be necessary in order to bring them into compliance with the solicitation requirements. Because these offerors had been afforded an opportunity to correct their proposal deficiencies through discussions, but had failed to do so in numerous areas--30 for MRK and 8 for Halliburton--the SSB questioned whether they fully understood the required work. Since the revised proposals still failed to meet the solicitation requirements in a significant number of important evaluation areas, the SSB concluded that MRK and Halliburton had no reasonable chance for award and recommended that the SSA eliminate them from the competitive range.

On May 10, a request for best and final offers (BAFOs) was issued to the four offerors remaining in the competitive range, and BAFOs were received by May 17. After evaluating the BAFOs, award was made to IT Corporation/OHM on May 31 and all other offerors were so notified.

Following award to IT Corporation/OHM, four offerors (Ebasco Constructors, Inc.; Kimmins Thermal Corp.; AWD Technologies, Inc.; and Chemical Waste Management, Inc.) filed protests with our Office; MRK and Halliburton filed protests with the procuring agency. The agency denied MRK's and Halliburton's protests on August 28, and MRK and Halliburton then filed protests with our Office on September 12 and September 13, respectively. On October 16, we denied the four protests initially filed in our Office. See Ebasco Constructors, Inc. et al., B-244406 et al., Oct. 16, 1991, 91-2 CPD ¶ 341.

<sup>&#</sup>x27;The average price for the "low" group was \$75,094,705; the average price for the "middle" group was \$114,010,258; the average price for the "high" group was \$126,081,476.

# MRK's PROTEST

MRK first protests that the solicitation provided for a "hybrid" procurement wherein the agency combined elements of competitive negotiations with elements of two-step sealed bidding. MRK also complains that the agency was looking for specific elements and technologies as prerequisites for award, based on the results of an expensive engineering report it received, but did not disclose these requirements in the solicitation. Specifically, the protester alleges that the agency informed it during the debriefing that its proposal was downgraded for failing to include an on-site laboratory, noting that the RFP did not require such a facility to be on-site. MRK also alleges that the agency would only accept certain cechnologies for use in site remediation, and did not fairly evaluate the "new, innovative and cost-effective technologies" proposed by MRK. Finally, MRK argues that the initial inclusion of its proposal in the competitive range demonstrates that it was sufficiently acceptable to receive award, and that its later exclusion from the competitive range ignored the potential \$47,000,000 savings represented by its proposal.

To the extent MRK is challenging the solicitation provisions, we dismiss the protest as untimely since the alleged deficiencies were apparent on the face of the solicitation, but were not protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991).

With respect to MRK's contention that its proposal was improperly evaluated and eliminated from the competitive range, we disagree. The evaluation of proposals and the resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. Smith Bright Assoc., B-240317, Nov. 9, 1990, 90-2 CPD ¶ 382. A procuring agency is not required to include a technically unacceptable proposal in the competitive range where deficiencies in the proposal are so material that major revisions would be necessary to make the proposal acceptable, and a proposal which does not demonstrate the required understanding may be rejected as unacceptable. Ebasco Constructors, Inc. et al., supra. In reviewing an agency's evaluation, we will not substitute our judgment regarding the merits of the proposals for that of the agency, but instead will examine the agency's evaluation to determine whether it was reasonable. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD 5 588. Moreover, it is not unreasonable to use a relative approach in determining the competitive range based on the array of scores actually obtained by other offerors. Id. Finally, the fact that a

proposal was initially included in the competitive range does not preclude an agency from later excluding the proposal from further consideration where there is no reasonable chance of receiving award. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203.

The agency determined that MRK did not have a reasonable chance to receive award given the fact that even after the initial round of discussions and revisions, its proposal was deficient in 30 of the 83 evaluation areas. MRK's proposal was the lowest rated proposal with a total score of 363 out of a possible 1,000 points. Our review of the record indicates that MRK's proposal was downgraded because it failed to submit sufficient information for the agency to determine whether the processes and performance methodology MRK proposed would comply with the specification requirements. Even after being specifically asked during the initial round of discussions to provide additional information in the deficient areas, MRK failed to do so.

For example, regarding the requirement of a laboratory, the RFP provided that while an on-site laboratory was not required, a 24-hour turn-around time for analytical results of soil samples was necessary. MRK's initial proposal stated only that Environmental Testing and Certification Corporation (ETC) would be used to perform analytical testing, that ETC had a branch office in Baton Rouge, Louisiana, that all samples would be delivered to that branch office, and that shipment of samples to other ETC branches would be in accordance with appropriate regula-The agency's discussion letter to MRK requested that it provide further information regarding its proposed laboratory and to discuss how it would comply with the 24-hour turn-around time requirement. MRK's complete response was: "[T]here will be no on-site laboratory. samples will be taken and analyzed by a soils testing and engineering company such as Eustes Engineering or Gore Engineering of New Orleans, Louisiana." MRK did not respond to the agency's specific request for a discussion of its turn-around time. The evaluation panel maintained MRK's score of 1 for this evaluation factor.

Based on our review of the record, it is clear that the agency did not require an offeror to prepare an on-site laboratory; however, it was concerned with the turn-around time proposed—a subject MRK failed to address, despite the agency's specific request that it do so. This failure to provide information is representative of MRK's entire proposal. In light of MRK's failure to provide necessary

information, we find no basis to question the agency's determination that MRK was technically unacceptable. 5

MRK's protest is denied.

### HALLIBURTON'S PROTEST

Halliburton's agency-level protest raised three issues: (1) there was an unreasonably short period of time in which to submit proposal revisions; (2) the agency failed to provide sufficient information to offerors concerning specific RFP requirements; and (3) the proposal process was unfair and prejudicial to Halliburton in failing to recognize the limited number of dredging subcontractors After the agency denied and dismissed its available. protest, Halliburton filed a protest with our Office. However, in its protest to our Office, Halliburton does not raise any of the issues it raised at the agency level; rather, it presents three new issues. In the protest filed with our Office, Halliburton challenges its elimination from the competitive range on the grounds that the agency evaluated technical proposals in accordance with undisclosed criteria (the 0 to 4 rating system), conducted wholly inadequate discussions by only pointing out areas in which proposals received scores of 0 or 1, and evaluated revised proposals in such a limited amount of time as to render the evaluations meaningless.

We dismiss Halliburton's allegations concerning the 0 to 4 rating system and the adequacy of discussions as untimely because they were not raised within 10 working days after the basis for protest was known. 4 C.F.R. § 21.2(a)(2). At Halliburton's June 11 debriefing, it was informed of the 0 to 4 rating scale and that discussion items concerned only areas in which offerors were determined to be deficient, that is, areas in which they had received a score of 0 or 1. Halliburton did not raise these issues in its agency-level protest, but rather waited until it filed its protest with our Office. Where a protester initially files a timely protest, either with our Office or at the agency, and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements. Our regulations do not contemplate

<sup>5</sup>MRK's belief that its low price should have kept it in the competitive range is unfounded. While an agency must consider an offeror's proposed price in its competitive determination, which the record demonstrates was done here, there is no obligation to include a technically unacceptable proposal in the competitive range solely because of its low price. 52 Comp. Gen. 382 (1972); Unisys Corp., B-231704, Oct. 18, 1988, 88-2 CPD ¶ 360.

the unwarranted piecemeal presentation or development of protest issues. Midwest Contractors, Inc.; R.E. Scherrer, Inc., B-231101; B-231101.2, Aug. 8, 1988, 88-2 CPD - 115.

The only remaining issue is Halliburton's argument that the 4-day period for evaluation of proposal revisions was so short as to render discussions meaningless. The agency report responded to this allegation by noting that the TIEP put forth a comprehensive effort when proposal revisions were received. The agency explains that there were 20 transviewers involved in the evaluation and that these reviewers had previously reviewed the proposals and, therefore, were familiar with the deficiencies and information requested. In commenting on the agency report, the protester neither refutes the agency's argument nor substantially challenges the evaluator's conclusions concerning its proposal. Based on the record presented, we have no basis to object to the amount of time devoted to the evaluation of the revisions.

The protests are dismissed in part and denied in part.

Malus I. Mayby James F. Hinchman General Counsel

or our earlier decision regarding this procurement, we denied protests concerning the issues Halliburton now raises. Specifically, we held that the first aring system employed by the agency was consistent with the RFP provisions advising offerors how their proposals would be evaluated and that the agency was not obligated to conduct successive rounds of discussions with each offeror until all deficiencies were corrected. See Ebasco Constructors, Inc. et al., supra.

<sup>&#</sup>x27;It is unclear when Halliburton learned of the evaluation timetable--whether it only learned of it in the agency's denial of its protest or at the debriefing. Consequently, we will consider this issue.